United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

75-7512

B

To be argued by
RICHARD L. SCHMEIDLER

P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

CARLO BORDONI,

Plaintiff-Appellant,

against

TWIN COAST NEWSPAPERS, INC.
and HAROLD GOLD,

Defendants-Appellees.

ON APPEAL FROM AN ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANTS-APPELLEES

AMEND & AMEND
Attorneys for Defendants-Appellees
40 Wall Street
New York, N. Y. 10005
(212) 425-4230

RAYMOND F. SUPPLE
RICHARD L. SCHMEIDLER
of Counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

BRIEF OF DEFENDANTS-APPELLEES

Counter-Statement of Facts

This is the text of the article (A13) of which Plaintiff-Appellant, Carlo Bordoni ("Bordoni") complains:

Sindona to follow?

Italy Banker Resigning From Franklin Board

"A Milan banker closely associated with Italian Financier Michele Sindona, the major stockholder in Franklin New York Corp.—parent of the financially troubled Franklin National Bank—is resigning from the board of the bank's holding company, a Franklin spokesman confirmed Monday.

"Carlo Bordoni, a Milan banker who is director of Fasco International Holding, S.A., an investment company owned by Mr. Sindona, is leaving the board. He is the only other director of the Fasco Empire besides Mr. Sindona to sit on the Franklin Board.

"Mr. Bordoni's resignation prompted speculation that Mr. Sindona, who bought a 21.6 per cent stake in Franklin several years ago, might also leave the board. The New York Times said 'Mr. Sindona might be withdrawing—either by plan or from pressure from the regulatory authorities—from Franklin.' But the Franklin spokesman, Arthur G. Perfall, senior vice president, said there was 'no indication' Mr. Sindona plans to resign.

"Mr. Bordoni's exit from the board also raised questions about his role in the bank's foreign exchange trading.

"Franklin disclosed last week a $63.6 million loss for the first five months of 1974, $45.8 million of this

from foreign exchange transactions, putting the nation's 23rd largest bank in financial jeopardy.

"According to the Italian business magazine Successo, Mr. Bordoni was chosen by Mr. Sidona to play a major part in Franklin's foreign exchange trading. An article in the March issue said in part, 'Mr. Sindona plans to make money (at Franklin National) out of foreign currency. The presence at Franklin of the foreign exchange expert, Carlo Bordoni, explains everything.'

"When Franklin early in May announced omission of the second quarter dividend, it disclosed discovery of large losses from unauthorized foreign exchange trading. The bank's president was dismissed and its executive vice chairman, in whose department the losses occurred, resigned. Other changes were made in the international currency department. Earlier this month, a Treasury official said the government is investigating the possibility of fraud in connection with the losses.

"Should Mr. Sindona follow Mr. Bordoni out of the board room, the immediate future of Franklin National could become even more clouded than it is now.

"Mr. Sindona, in an effort to rescue the bank, had agreed to purchase any unsubscribed shares of two Franklin New York stock offerings designed to raise $50 million. But in Thursday's announcement of the resignation of Harold V. Gleason as chairman of the bank and its parent company, it was disclosed the Sindona offer was made conditional on two points: 'Continuation of the bank's normal business and the absence of proceedings challenging the agreement.'

"There have been no reports of lawsuits brought against Franklin in the interim. However, it is felt,

these conditions allow the Italian financier leeway in his agreement to pump $50 million into the holding company."

Such article will hereinafter be referred to as "the article."

ARGUMENT

POINT I

The complaint was properly dismissed as a matter of law.

In dismissing the Complaint pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure, the Court below held, as a matter of law, that the article complained of by Bordoni was not libelous *per se*. No factual issues were, or could be, involved. On this appeal, Bordoni contends, at page 7 of his brief, that the article "is libelous *per se* as a matter of law." Again, no issue of fact is suggested which would require a trial.

New York law requires that a plaintiff plead and prove special damages in an action for libel if the published material is not libelous *per se*. *Hinsdale* v. *Orange County Publications, Inc.*, 17 N.Y.2d 284, 285-86 (1966); *Nichols* v. *Item Publishers, Inc.*, 309 N.Y. 596, 600 (1956); *Balabanoff* v. *Hearst Consolidated Publications, Inc.*, 294 N.Y. 351 (1945); *Sydney* v. *Macfadden Newspaper Publishing Corp.*, 242 N.Y. 208, 211 (1926); *O'Connell* v. *Press Publishing Co.*, 214 N.Y. 352, 358 (1915); *McNamara* v. *Goldan*, 194 N.Y. 315, 321 (1909); *Crashley* v. *Press Publishing Co.*, 179 N.Y. 27, 34 (1904). Bordoni does not dispute this, contending rather that since the article is libelous *per se* no special damages need be pleaded (A 33). The sufficiency or insufficiency of the Complaint in stating a claim on which relief can be granted hinges entirely on whether the article is, or is not, libelous *per se*.

The determination that published matter is not libelous *per se* need not await the trial. On the contrary, the New York courts will consider the question on motion addressed to the sufficiency of the pleadings, when no special damages have been alleged. *Hinsdale* v. *Orange County Publications, Inc., supra; Nichols* v. *Item Publishers, Inc., supra; Sydney* v. *Macfadden Newspaper Publishing Corp., supra; McNamara* v. *Goldan, supra.*

The federal courts, when applying New York law, will similarly determine whether a publication is libelous *per se. Wofford* v. *Press Publishing Co.*, 211 F. 961 (2d Cir. 1914); *Keller* v. *Loyless,* 205 F. 510 (2d Cir. 1913); *Dorney* v. *Dairymen's League Cooperative Ass'n., Inc.,* 149 F.Supp. 615 (D.N.J. 1957); *Berg* v. *Printers' Ink Publishing Co., Inc.,* 54 F. Supp. 795 (S.D.N.Y. 1943), *aff'd.,* 141 F.2d 1022 (2d Cir. 1944).

The rules to be applied, and the fashion in which they are to be applied, have been carefully and thoroughly stated by the New York Court of Appeals:

> "The general rule, as we stated in *Nicholas* v. *Item Publishers* (309 N. Y. 596, 600-601), is that ' "A writing is defamatory—that is, actionable without allegation or proof of special damage—if it tends to expose a person to hatred, contempt or aversion, or to induce an evil or unsavory opinion of him in the minds of a substantial number in the community, even though it may impute no moral turpitude to him". And to that listing of the defamatory should be added a writing which tends to disparage a person in the way of his office, profession or trade.'
>
> "It is for the court, however, to decide whether a publication is capable of the meaning ascribed to it. (*Crane* v. *New York World Tel. Corp.,* 308 N. Y. 470, 479-480; *Julian* v. *American Business Consultants,* 2 N Y 2d 1, 14.) The canons are well known that where

the words are clear and plain, the court must determine whether they are libelous or nonlibelous; and whether the innuendo is necessary. (*O'Connell* v. *Press. Pub. Corp.*, 214 N. Y. 352; *Morrison* v. *Smith*, 177 N. Y. 366; Seelman, Law of Libel and Slander in New York, par. 436, p. 426.) The admitted purpose of an innuendo is to explain matter that is insufficiently expressed. Its office is to point out the libelous meaning of the words used. If the article is not susceptible of a libelous meaning, then innuendo cannot make it libelous. In *Fry* v. *Bennett* (5 Sandf. 54, 65) the court stated the rule in this manner: 'In brief, the question which an innuendo raises, is, in all cases, a question not of fact, but of logic. It is, simply, whether the explanation given is a legitimate conclusion from the premise stated; and to determine this question, must be, in all cases, the exclusive province of the court'. (See, also, Seelman, *op. cit., supra,* pars. 421, 430; *Hays* v. *American Defense Soc.*, 252 N. Y. 266; *O'Connell* v. *Press Pub. Corp., supra.*) The innuendo, therefore, may not enlarge upon the meaning of words so as to convey a meaning that is not expressed (*Gurtler* v. *Union Parts Mfg. Co.*, 285 App. Div. 643, 644-645, affd. 1 N Y 2d 5).

"The solution of the legal question always depends on the particular phraseology used in the purported libelous statement." *Tracy* v. *Newsday, Inc.*, 5 N.Y. 2d 134, 135-36 (1959).

It is for the court to determine, that is, it is a pure question of law, whether clear and plain words are libelous.

The article is plain, and its words are unambiguous. Contrary to Bordoni's suggestion, at page 27 of his brief, there is no uncertainty as to the sense in which any of the words of the article were used.

An example of a true ambiguity arose in a case relied upon by Bordoni:

> "The word 'cocotte' is a French word meaning a woman who leads a fast life, one who gives herself up for money. The interpreter said it implies to some men the same idea as the word prostitution. In other associations it may mean a poached egg." *Rovira* v. *Boget,* 240 N.Y. 314, 316 (1925).

There is no such ambiguity here. The words of the article are plain: "banker," "associated," "resigning" and so forth. The issue is whether the explanation given by Bordoni to these words—the innuendo—is sound. This is a question of law, to be determined by the court and not by a jury. *Tracy* v. *Newsday, Inc., supra.*

The innuendoes suggested by Bordoni in his Complaint and his argument will be analyzed in Points III and IV, *infra,* respectively. There it will be shown that the Court below was correct in its determination that the article is not libelous *per se.* It is respectfully submitted that undertaking such a determination as a matter of law was proper under the decisions both of the New York Court of Appeals and of this Court.

POINT II

None of the statements in the article is libelous *per se.*

Bordoni lists, at pages 11-13 of his brief, fourteen statements and alleged innuendoes which he derives from the article. Of the nine statements in the list, not one is libelous *per se.* The alleged innuendoes will be considered in Point IV, *infra.*

There is agreement on this appeal as to the abstract statement of what constitutes libel *per se* (A 33). This

includes charging another with commission of a crime, *Moore* v. *Manufacturers' Nat'l. Bank,* 123 N.Y. 420, 424 (1890), or holding one up to public contempt or disgrace, or inducing an evil or unsavory opinion of one in the minds of a substantial number of the community. *Mencher* v. *Chesley,* 297 N.Y. 94, 100 (1947); *Balabanoff* v. *Hearst Consolidated Publications, Inc., supra.* When one is engaged in a trade or profession, a publication which disparages him in such trade or profession will also be libelous *per se. Tracy* v. *Newsday, Inc., supra* at 135-36; *Nichols* v. *Item Publishers, Inc., supra* at 600-01.

Analysis of the statements in the article leads to the inescapable conclusion that none constitutes libel *per se,* when considered without the elaboration of an innuendo.

A. Resignation and Association with Sindona.

Bordoni first complains of statements that he was resigning from the Board of Directors of Franklin New York Corp. (hereinafter referred to as "Franklin"), the parent of Franklin National Bank (hereinafter referred to as "the Bank"). He complains that he is alleged to be an associate of Michele Sindona (hereinafter referred to as "Sindona"), and that suggestions are made that Sindona might be withdrawing from Franklin under pressure from the regulatory authorities. None of these statements is libelous *per se.*

The statement of Bordoni's resignation could not be libelous *per se.* Even saying that he had been removed or dismissed would not be defamatory, absent an insinuation that the dismissal was for misconduct. *Nichols* v. *Item Publishers, Inc., supra* at 601.

The same would be true as to the suggestion that Sindona "might be withdrawing . . . from pressure." Even if this had been said about Bordoni—and it was not—it would not have been defamatory without an insinuation of misconduct.

Finally, there is no libel *per se* in an allegation of close association with Sindona. In essence, the Court is being asked to take judicial notice that there is a widespread public aversion for associates of Sindona. Such an aversion is not pleaded, and it is respectfully submitted that there exists no such aversion in the public mind. Compare *Mencher* v. *Chesney, supra* at 100 (widespread public aversion for communism, its adherents and sympathizers), in which the New York Court of Appeals buttressed its view of the public attitude with citations of legislation, executive orders, law review articles, and prior cases.

B. Bordoni's Role at the Bank and the Bank's Losses.

Continuing with the statements of which Bordoni complains, there are observations that his exit from the Board "raised questions about his role in the Bank's foreign exchange trading" and that he "was chosen by Mr. Sindona to play a major part in such trading" and "to make money (at Franklin National) out of foreign currency." Both losses from foreign exchange transactions of $45.8 million and "large losses from unauthorized foreign exchange trading" are described.

Leaving aside the alleged innuendo of Bordoni's responsibility for these losses, there is nonthing in these parts of the article which reflects adversely on Bordoni. The article does not state that Bordoni is responsible for the losses; the alleged innuendoes on which Bordoni relies will be considered in Point IV, *infra*.

C. Governmental Investigation of Fraud.

That "the government is investigating the possibility of fraud in connection with the losses" in no way reflects upon Bordoni unless he is connected to the investigation or the losses. Such involvement with the losses is, as has been observed above, a matter of alleged innuendo, rather than an allegation in the article. Bordoni's connection with the

investigation is similarly asserted by him in his brief as alleged innuendo; this will be considered in Point IV, *infra*. Absent such a connection, and Bordoni complains of no such specific connection in the article, there is nothing libelous *per se* about the report of this investigation, as it appears in the article.

D. Dismissal and Resignation of Officers, and Other Changes at the Bank.

Bordoni complains of the report of the dismissal of the Bank's President and the resignation of the executive vice chairman, in whose department the losses occurred. The article refers to other changes made in the international currency department, presumably personnel changes. Bordoni's brief, at page 13, transmutes this to "other charges" in the department.

Nothing here is defamatory of anyone. Even as to the officers who resigned or were dismissed, there could be no defamation, without an imputation of dishonesty. *Nichols* v. *Item Publishers, Inc., supra. A fortiori,* there was no defamation of Bordoni, even if he had some relationship to these changes.

Thus it is clear that the article of which Bordoni complains is without defamatory import in and of itself. None of the statements made are libelous, *per se,* of Bordoni.

POINT III

The only innuendo in the complaint is strained, unreasonable and unjustified.

Adopting the language of the New York Court of Appeals in a recent case, the Court below characterized the innuendo of the Complaint as "strained, unreasonable and unjustified." In so holding, the Court below was correct. It committed no error, and its determination should be affirmed.

The only innuendo in the Complaint is ¶ 31 (A 9). It charges that the Defendants-Appellees, the publisher of the Journal of Commerce and its managing editor, meant, intended to mean, and were understood to mean that Bordoni had participated in criminal acts. Such acts are not detailed—they are pleaded generally as violations of unspecified "Federal banking statutes" and other "Federal statutes, rules and regulations." The only indication of specifics is that such statutes include disclosure requirements applicable to banks and other public corporations.

There is nothing in the article which has any connection with violation of any Federal banking statutes by Bordoni or anyone else. There are references to losses incurred by Franklin. It is not, however, a violation of any Federal statute, rule or regulation, simply to lose money. The reference to a governmental investigation of the possibility of fraud does not support the innuendo pleaded in the Complaint. It does not relate in any fashion to Bordoni, as will be seen in Point IV, *infra,* which considers the unpleaded innuendo that the report of the investigation implies an investigation of Bordoni.

What this innuendo is attempting to do is plain. It attempts to insinuate breaches of disclosure requirements into an article which has nothing to do with any disclosure requirements. The closest the article comes is to use the word "disclosed" three times as a synonym for "reported" or "said." This is a far cry from charging breach of Federal disclosure rules.

The charge of violation of other statutes, rules and regulations has even less foundation, if that is possible. There is no reference in the article to any such requirement. There is no reference to any act which might possibly constitute a violation. "The innuendo, therefore, may not enlarge upon the meaning of words so as to convey a meaning that is not expressed." *Tracy* v. *Newsday, Inc.,*

supra at 136. But this innuendo does just that, importing into the article violations of statutes, rules and regulations when neither the violations nor the statutes found any expression in the article.

The actual statements in the article of which Bordoni complains have been considered in Point II, *supra*. There is nothing on his list of quotations from the article which suggest any violation of law by anyone, except for the reference to an investigation of the possibility of fraud. Everything else is utterly innocent. There is no suggestion that any mandatory disclosures either were or were not made, or that Bordoni took any part in such disclosure or non-disclosure. The innuendo of other criminal acts is equally unwarranted by anything in the article. As an explanation of the meaning of the article, *Tracy* v. *Newsday, Inc., supra* at 136, the pleaded innuendo is untenable. "It does not explain any statement in the article, but adds an entirely new and independent thought that finds no support in the article." *Tracy* v. *Newsday, Inc., supra* at 137.

POINT IV

The unpleaded innuendoes are also unsound.

A. Withdrawal by Plan or from Pressure.

Bordoni's complaint included only one innuendo, in Paragraph 31. This is refuted in Point III, *supra*. In Bordoni's brief at pages 12 and 13, he suggests several more as inferences, of which the first is an inference that "Bordoni might be withdrawing either by plan or from pressure from the regulatory authorities."

This inference is by no means logically compelling. It is not necessary to conclude that Bordoni's resignation was induced by the same forces as Sindona's possible withdrawal. The far more natural inference, in view of Sin-

dona's controlling position, would be that Bordoni acted under pressure from Sindona. In any event, the clear import of the article is that Bordoni's departure might cast light on Sindona's plans, not that Sindona's uncertain plans might cast light on Bordoni's well-documented departure.

Even if the innuendo were accepted, there is nothing defamatory in it. It is not disgraceful to withdraw "by plan"; there would be nothing defamatory in a report of such a withdrawal. Similarly, if there is nothing defamatory even in reporting outright removal from office, *Nichols* v. *Item Publishers, Inc., supra,* then *a fortiori* there would be nothing defamatory in reporting a resignation as being "under pressure." It would not hold Bordoni up to public contempt or disgrace, nor induce an evil opinion of him, nor disparage him in his profession, nor charge him with commission of a crime.

B. Responsibility for Foreign Exchange Losses.

In his brief, although not in his Complaint, Bordoni alleges, by innuendo, that defendants attributed responsibility to him for the Bank's losses from unauthorized and unprofitable foreign exchange trading. These innuendoes may not reasonably be drawn from the article.

As to the unauthorized transactions, the logical fallacy is clear. If the transactions were unauthorized, how is Bordoni involved? The only connection that appears is made by Bordoni himself, not by the article of which he complains. The emphasis, which Bordoni has supplied to portions of the article he asserts directly or indirectly relate to himself, stresses the *"discovery of large losses from unauthorized foreign exchange trading."* The article, however, attributes responsibility for these losses (to the extent any attribution is made) to the "executive vice chairman, *in whose department* the losses occurred." (Emphasis supplied.)

In the companion case, *Bordoni* v. *New York Times Co., Inc.*, 74 Civ. 3168 (S.D.N.Y. July 15, 1975), the New York Times' report was similar to that of the article at issue on this appeal. The Court below, in a decision from which Bordoni has not appealed, drew exactly this inference, rejecting Bordoni's claim that such a report of the resignation of others could attribute responsibility to him. (A 87-88; that article is at A 80-83.)

While the article states that Bordoni is an expert in foreign exchange matters, this is not defamatory. *Labouisse* v. *Evening Post Publishing Co.*, 10 App. Div. 30, 33, 41 N.Y.S. 688 at 690 (1st Dept. 1896). Expertise, although not in the realm of foreign exchange *in haec verba*, is admitted by Bordoni in his Complaint. He does deny putting his expertise to work for the Bank by taking responsibility for specific transactions to which the Bank was a party. There is nothing in the article inconsistent with this denial. On the contrary, the article attributes the responsibility for the losses to officers *other than* Bordoni. Any inference to the contrary runs counter to the reasonable import of the article, and should be rejected.

Although the article does not attribute responsibility for the losses to Bordoni, such an attribution would not be libelous *per se*.

This innuendo does not charge Bordoni with commission of a crime. It is not a crime to lose money. Cases such as *Kahane* v. *Murdoch*, 218 App. Div. 591, 218 N.Y.S. 641 (1st Dept. 1926) and *Jacquelin* v. *Morning Journal Ass'n.*, 39 App. Div. 515, 57 N.Y.S. 299 (1st Dept. 1899), relied on by Bordoni, in which charges of embezzlement or forgery were clearly published, have no bearing on this innuendo, where Bordoni is complaining of an alleged attribution of responsibility for losses suffered in business transactions. If there is to be libel *per se*, it must be shown that Bordoni was disparaged in his profession. *Nichols* v. *Item Publishers, Inc., supra.*

Bordoni goes so far as to assert that "[t]o perform, he must be of impeccable character and *highly successful.*" (Emphasis supplied.) It is not the law of New York that any imputation that a man has not been highly successful is libelous *per se.*

> "The utmost that can be said about the defendant's publication is that it is an allegation that the plaintiff's shows had been closed by him because they were not successful. There was nothing in this statement that directly tended to injure the plaintiff in respect to his business or which impaired confidence in his character or ability. The fact that a business enterprise of any character has not been successful does not directly tend to injure the party conducting the enterprise. There is nothing but lack of success charged. It is not even charged that the lack of success was the fault of the plaintiff's management or judgment. There is nothing charged against the plaintiff in relation to his profession or occupation; nothing to indicate that the lack of success was because of any fault of the plaintiff, or that his conduct of the shows had caused their lack of success. A mere statement of the publication shows that there was no charge made against the plaintiff in connection with his profession or occupation that would directly tend to injure the plaintiff or to impair confidence in his character or ability." *Perley* v. *Morning Telegraph Co.,* 131 App. Div. 599, 602, 116 N.Y.S. 57 at 58-59 (1st Dept. 1909).

Nevertheless, Bordoni contends that his skill is the "cornerstone" of his reputation, and it is as an alleged aspersion on his successfulness that Bordoni contends that the article is libelous *per se.* This is simply not the law of New York. A report of lack of success is not libelous *per se.*

In New York, even an assertion that a professional was "reckless and irresponsible" in a particular matter has been

held not to be libelous *per se*. *Rager* v. *Lefkowitz*, 20 App. Div.2d 867, 249 N.Y.S.2d 486 (1st Dept.), *motion for leave to appeal denied*, 14 N.Y.2d 487, *appeal dismissed*, 14 N.Y.2d 842 (1964). Responsibility for the Bank's losses would be a far milder accusation.

Rager v. *Lefkowitz, supra*, is just one instance of New York's general rule that it is not libelous *per se* as an attack on professional ability to allege a single instance of ignorance, mistake, or even impropriety. *November* v. *Time, Inc.*, 13 N.Y.2d 175 (1963); *Twiggar* v. *Ossining Printing & Publishing Co.*, 161 App. Div. 718, 146 N.Y.S. 529 (2d Dept. 1914), *appeal dismissed*, 220 N.Y. 716 (1917); *Foot* v. *Brown*, 8 Johns. 64 (Sup. Ct. 1811). The innuendo that Bordoni was responsible for the Bank's losses, if such innuendo were sound, would be an innuendo of unskillfulness, of failure, once, in being "highly successful." It would not be an accusation of total disregard of professional ethics. *November* v. *Time, Inc., supra*. No such accusation could possibly be read into the article.

A recent application of this rule in a very similar context may be found in *Arnold Bernhard & Co., Inc.* v. *Finance Publishing Corp.*, 32 App. Div.2d 516, 298 N.Y.S.2d 740 (1st Dept.), *aff'd*, 25 N.Y.2d 712 (1969). The factual context is set forth in the report of the affirmance by the Court of Appeals, without opinion. The article here complained of similarly

> "imputes nothing evil to plaintiff, nor does it charge either negligence or incompetence, consisting, as it does of [a] . . . recital of what at worst might be considered a single instance of mistaken exercise of business judgment on plaintiff's part, without any imputation of fraud, deceit or malpractice." *Id.*

The Court of Appeals similarly, affirmed, without opinion, *Amelkin* v. *Commercial Trading Co., Inc.*, 23 App. Div.2d 830, 259 N.Y.S.2d 396 (1st Dept. 1965), *aff'd*, 17 N.Y.2d 712 (1969).

Since the innuendo of responsibility for the Bank's losses involves only a single instance in which Bordoni was less than highly successful, such innuendo cannot render the article libelous *per se.* Bordoni attempts to evade the single instance rule by arguing, at page 30 of his brief, that the article is not directed to a single transaction but rather "to the entire series of foreign currency transactions conducted by the Bank at the direction of Bordoni." If there were a series of transactions which Bordoni directed, this is Bordoni's claim, not any matter reported in the article. The same is true of Bordoni's reference to his "organizing the Franklin National Bank's foreign exchange department," on page 28 of his brief. This was no part of the article published by the Defendants-Appellees, and it is not their contention on this appeal. It is another invocation by Bordoni of a "new and independent thought that finds no support in the article." *Tracy* v. *Newsday, Inc., supra* at 137.

C. Investigation of Fraud

Continuing with the innuendoes alleged in his brief but not in the Complaint, Bordoni says that the article complained of is to be construed to mean that "the government is investigating Bordoni and the 'possibility' that he committed 'fraud in connection with the losses.' " This construction is not supported by a reasonable reading of the article, nor does it allege a libel *per se.*

The connection between Bordoni and the investigation may be found only in his mind. It is not to be found in, nor to be inferred from, the article. The report of the investigation was made before Bordoni resigned, and the article so indicates. The article connects the investigation with losses which are never attributed to Bordoni, as has just been shown. There is no basis for connecting either the report of the investigation or the investigation itself with Bordoni, whose resignation had no direct connection,

so far as may be seen or inferred from the article, with any fraud which may have been practiced upon the Bank.

Even if the article had alleged that the investigation was an investigation of Bordoni, there would have been no libel *per se*. An investigation is not the same as a charge of fraud. One might well hope that the Treasury would investigate the largest bank failure in American history. This is a far cry from the possibility that a particular director committed fraud.

It may be noted that the investigation described in the article is a *civil* investigation by the Treasury, not a criminal investigation by the Justice Department. A false report of a civil inquiry, stating that a professional had been found to be at fault and was fined, was held not to be libelous *per se*. *Smith* v. *Staten Island Advance Co., Inc.*, 276 App. Div. 978, 95 N.Y.S.2d 188 (2d Dept. 1950), *aff'g.* 194 Misc. 299, 87 N.Y.S.2d 847 (Sup. Ct. Richmond County 1949). The "single instance" rule was followed, the court citing *Twiggar* v. *Ossining Printing & Publishing Co., supra,* and *Foot* v. *Brown, supra.*

As has been shown, the "single instance" rule is firmly established as the law of New York. That rule should be applied to the innuendo of a single investigation. The necessary conclusion is that such innuendo does not state a claim for libel *per se,* but remains subject to the requirement of pleading special damages.

D. Relationship to Personnel Changes

As a last inference, Bordoni argues that it may be inferred that his resignation is related to the dismissal and resignation of two other officers. This is another strained inference. But again, there is no taint of libel *per se*. A false report of a dismissal is not libelous *per se*. *Nichols* v. *Item Publishers, Inc., supra.* How much less, then, this report of a resignation merely related to a dismissal and another resignation.

Conclusion

The Court below was correct in deciding the motion to dismiss as a matter of law. The article is not libelous *per se,* and the one pleaded innuendo is unwarranted. The additional innuendoes argued by Bordoni but not pleaded are unsound; furthermore they would not add enough to make the article libelous *per se* even if they were compelling.

It certainly cannot be said that the article is libelous *per se* as a matter of law, and therefore the judgment of the Court below should be affirmed.

Respectfully submitted,

AMEND & AMEND
Attorneys for Defendants-Appellees
40 Wall Street
New York, New York 10005
Tel. No. (212) 425-4230

EDMOND F. SUPPLE
RICHARD L. SCHMEIDLER
of Counsel

12/10

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CARLO BORDONI,

Plaintiff-Appellant,

against

TWIN COAST NEWSPAPERS, INC.
and HAROLD GOLD,

Defendants-Appellees.

State of New York,
County of New York,
City of New York—ss.:

DAVID F. WILSON, being duly sworn, deposes and says that he is over the age of 18 years. That on the 10th day of December, 1975, he served two copies of Brief of Defendants-Appellees on DiFalco, Field & Lomenzo, Esqs., the attorneys for Plaintiff-Appellant by delivering to and leaving same with a proper person in charge of their office at 605 Third Avenue in the Borough of Manhattan, City of New York, between the usual business hours of said day.

David F. Wilson

Sworn to before me this
10th day of December, 1975.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1976